
UNIT 6 FEATURES OF ONLINE CONTRACTS

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6.1 INTRODUCTION

The Indian Contract Act, 1872 lays down that for a contract to exist there has to be a proposal, and an assent to the proposal, which transforms into a promise. A promise supported by consideration becomes an agreement and an agreement enforceable by law is a contract. Likewise, an online contract follows the same pre-requisite as being followed in offline (physical) contract. At a basic level, online contract formation requires online offer/proposal by one party and its online acceptance by the other party.

6.2 OBJECTIVES

After studying this unit, you should be able to:

- explain the essential features of a contract;
- describe proposal, acceptance and pre-requisites of a valid contract;
- explain when a communication is complete in case of online contracts;
- compare between the postal route and the Instantaneous Communication Rule; and
- describe the use of digital signature in online communication.

6.3 ESSENTIAL FEATURES OF A CONTRACT

Under the Indian Contract Act, 1872 the formation of a contract is a *two-limb* process, involving *firstly*, a communication of proposal from first party to the second and *secondly*, a communication of acceptance from the second party to the first.

6.3.1 Pre-requisites of a Valid Contract

In order to have a valid contract there should be a proper offer/proposal by an offeror [section 2(a)] and its acceptance by an offeree [section 2(b)]. Proposal must be supported by consideration [Section 2(d)] and the agreement must be made by free consent of the parties [sections 13-22].

Moreover, it is important that the parties must be competent to contract [sections 11 & 12)] and the object of contract must be lawful [section 23-25]. Further, there should be meeting of minds, *consensus ad idem*, which means both parties must agree to the same thing in the same sense. There should be no ambiguity.

6.3.2 Valid Offer

Under the Indian Contract Act, there should be minimum two parties, legal or natural, competent to contract. Offer to a contract must have an object that is lawful; it must be communicated to the person for whom it is meant and it should be communicated with the objective of obtaining assent.

Further, terms and conditions of offer should be certain or capable of being made certain.

There should be an intent of creating a legal relationship.

6.3.3 Valid Acceptance

The offer must be communicated to the acceptor and must come to the knowledge of the acceptor before the acceptance. The offer must be made to the acceptor by the offeror himself or through his duly appointed legal agents. The acceptance must be made by the acceptor himself or through his duly appointed legal agents, to the offeror.

Also, the acceptance must be made before the offer lapses [section 6]. The communication of acceptance must be complete in the eyes of law. Acceptance may be express or implied, absolute and qualified.

Please answer the following Self Assessment Question.

Self Assessment Question 1

Spend 3 Min.

Define a Contract?

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6.4 THE PROCESS OF COMMUNICATION: OFFLINE CONTRACTS

Under Section 4 of the Indian Contract Act, the communication of “Proposal” is complete, when it comes to the knowledge of the person to whom it is made.

The communication of “Acceptance” is complete:

- As against the “Proposer”, when it is put in the course of transmission to him, so as to be out of power of the “Acceptor”.
- As against the “Acceptor” when it comes to the knowledge of the “Proposer”.

A contract comes into existence when the acceptor puts his acceptance/assent into transmission so as to be out of the power of the said acceptor.

Contract through post/correspondence is complete at the place where acceptance is made.

For a contract to happen there should be a communication of proposal and communication of acceptance as well. This process of communication may involve communication by post or by telephone, while former being referred to as postal communication and latter as instantaneous communication.

6.4.1 Postal Rule

Postal Rule requires that the proposer / acceptor has to put into transmission the concerned proposal / acceptance so as to be out of power of the said proposer / acceptor.

Acceptance is complete as soon as the letter is put into the post box and that is the place where the contract is made. The postal rule lays emphasis on both communication of proposal and communication of acceptance. Contract through post/correspondence is complete at the place where acceptance is made.

6.4.2 Instantaneous Communication Rule

In case of instantaneous communication the contract is made where the acceptance was so received. It is now a settled law that a

contract is complete when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received. It was in *Entores Ltd. v. Miles Far Eastern Corporation* [(1955) 2 QB 326], wherein the plaintiffs, in London, made an offer by telex to the agents of the defendant corporation, in Holland. This was accepted by a telex, which was received on the plaintiff’s telex machine in London. The relevant issue was whether the contract was made in England. If it were, that would provide a basis for the plaintiffs to serve a writ on the defendant corporation outside the jurisdiction. The court held that the contract was made in London.

Denning, L.J., observed:

“When a contract is made by post it is a clear law throughout the common-law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about

contracts made by telephone or by telex. Communication by these means are virtually instantaneous and stand on a different footing.”

“My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received”.

A similar view was expressed by the Supreme Court in *Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas and Co.* [1966 S.C. 543]. In this case, the plaintiffs commenced an action in the City Civil Court at Ahmedabad against the Kedia Ginning Factory & Oil Mills of Khamgaon [defendants] for a decree of Rs.31,150/- on a plea that the defendant had failed to supply cotton seed cake, which they had agreed to supply under an oral contract dated July 22, 1959 negotiated between the parties by conversation on long distance telephone. The plaintiffs submitted that the cause of action for the suit arose at Ahmedabad, because the defendants had offered to sell cotton seed cake, which was accepted by the plaintiffs at Ahmedabad.

The decision by majority was that telephone is an instantaneous mode of communication, as if the parties were in presence of each other. The exception to the general rule, as applied to post, would not apply here. So, in this case, the contract would be made at the place where acceptance is received, i.e., Ahmedabad.

Table 1: Postal Rule v. Instantaneous communication rule¹

Postal Rule	Instantaneous Communication Rule
Contract through post/correspondence is made at the place where acceptance is made.	Contract through telephone/ telex/fax is made at the place where the acceptance is received.

It is thus evident from the aforesaid discussion on postal and instantaneous communication rule² that it is the acceptance that gives rise to the cause of action and not merely the making of an offer.

Please answer the following Self Assessment Question.

Self Assessment Question 2	<i>Spend 3 Min.</i>
When is communication of acceptance complete?	
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6.5 THE PROCESS OF COMMUNICATION: ONLINE CONTRACTS

Contract formation in an online environment follows the same pre-requisite as have to be followed in offline (physical) contract. It requires online offer/proposal by one party and its online acceptance by the other party. The Information Technology Act, 2000 has not amended, modified or substituted the Indian Contract Act, 1872 in any manner whatsoever. In order to form a valid electronic contract one still needs a ‘promisor’ and a ‘promisee’³.

6.5.1 The Information Technology Act, 2000: Parties to Communication Process

The Information Technology Act came into effect from October 17, 2000. The Act identifies three parties to the electronic transmission process: the originator [section 2(1)(za)], the intermediary [section 2(1)(w)] and the addressee [section 2(1)(b)].

The Originator

Originator, as defined under the Act means a person who sends, generates stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary.

The Intermediary

Intermediary with respect to any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.

The Addressee

Addressee, as defined under the Act means a person who is intended by the originator to receive the electronic record but does not include any intermediary.

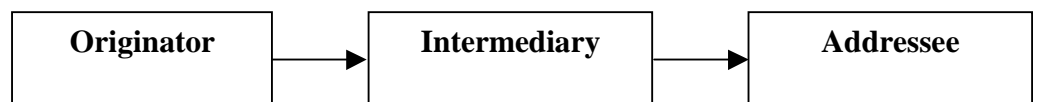


Figure 1: Electronic Communication Process

The role of all the three parties involved in an electronic communication process is distinct. For a given electronic message, there would be an originator, an intermediary and an addressee. The categories like originator and addressee are *dynamic*, i.e. for an electronic message there would be a sender (originator) and a recipient (addressee) of that message, but suppose the recipient replies back to the sender, then in such a case the recipient would become the originator of that electronic message (reply) and the sender would thus become the addressee. Interestingly, during the entire activity of exchange of such messages between the parties, the category of the intermediary⁴ would remain *static*, i.e. its function would remain the same irrespective of role reversal of the originator and the addressee. The function of an intermediary is that of a facilitator, a third party service provider, like e-mail service provider, web services provider etc.

It is obligatory to note that categories like, originator and addressee are not to be considered as equivalent to 'promisor' and 'promisee' [S.2(c)] of the Indian Contract Act, 1872. A promisee may act as an originator or an addressee vis-à-vis any electronic message, depending on its functional role. The categories 'originator-intermediary-addressee' facilitate end-to-end communication process.

6.5.2 The Information Technology Act, 2000: Process of Communication

The Information Technology Act grants legal recognition to *communication process* involving computer, computer system and computer network by identifying attribution, acknowledgement, dispatch and receipt of electronic records as key statutory provisions.

Attribution of Electronic Records

Section 11 of the Act lays down conditions as and when an electronic record shall be attributed to the originator as defined under [section 2(1)(za)] of the Act. The conditions as laid down are performance specific: (a) sent by the originator himself (b) sent by an authorized person on behalf of the originator and (c) sent by an information system programmed by or on behalf of the originator to operate automatically.

Acknowledgement of Receipt of Electronic Records

Section 12 of the Act addresses a number of legal issues arising from the use of acknowledgement of receipt. It is based on the assumption that acknowledgement procedures are to be used at the discretion of the originator. The procedures range from a mere acknowledgement of receipt of electronic record by the addressee to receipt of acknowledgement received by the originator within a reasonable time.

Acknowledgement of receipt plays a very important role in the communication process involving computer, computer system and computer network. Acknowledgement does not mean acceptance. It only signifies that the message has been received.

Section 12(1) provides for a situation where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method. An acknowledgment may be given either by any communication by the addressee, automated or otherwise or any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

Section 12(2) provides for the situation where the originator has specified to the addressee that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, and then unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator. The onus is on the addressee to make sure that the originator did receive the acknowledgement as sent by him.

Significantly, section 12(3) lays down an *optional* procedure to be adopted by the originator in case of non-receipt of acknowledgement by the originator. As per the statutory provision the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time

by which the acknowledgment must be received by him. Furthermore, if no acknowledgement is received within the aforesaid time limit, originator may after giving notice to the addressee, treat the electronic record as though it has never been sent.

Dispatch of Electronic Records

Apart from acknowledgement of receipt by the addressee, it is also important to ascertain the time and place of dispatch of electronic record.

According to section 13(1) of the Act, the dispatch of an electronic record occurs when it *enters* a computer resource outside the control of the originator. The process of “dispatch” involves electronic transmission of the electronic record to a destination. The Act defines the time of dispatch of an electronic record as the time when it *enters* a computer resource⁵ outside the control of the originator, which may be the computer resource of the addressee (or an intermediary). The electronic record should not be considered to have been dispatched if it merely reached the computer resource of the addressee but failed to enter it, i.e. by some reason the addressee has not been able to access or retrieve the electronic record from that computer resource successfully.

Receipt of Electronic Records

From the statutory point of view, the receipt of electronic record is as important as its dispatch. If dispatch occurs at the originator’s end, then the receipt occurs at the recipient’s end. It is important to note from the legal perspective whether the originator has sent the message at a designated computer resource or a non-designated computer resource. A designated computer resource implies a computer resource that has already been designated by the recipient to receive all e-mail communications, for example, an e-mail address of the recipient, which the recipient has already provided to the originator. A non-designated computer resource is the one, which has not been stipulated by the recipient to the originator for electronic communication purposes.

It is important to note that the Act has distinguished between the receipt of electronic record at a designated and non-designated computer resource. Under section 13(2) of the Act, the receipt occurs at the time when the electronic record enters the designated computer resource. But it may so happen that the originator sends the electronic record to a non-designated computer resource, in such a case receipt occurs at the time when the electronic record is *retrieved* by the addressee.

Dispatch of Electronic Records and Place of Business

In the world of electronic contracts, parties may be accessing their e-mails while on the move, and then the critical question is – how cause of action is fixed in the case of a dispute?

Under the Act, section 13(3) provides that an electronic record is deemed to be dispatched from the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

Further, it provides under section 13(5) that:

- (a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

- (b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;
- (c) “usual place of residence”, in relation to a body corporate, means the place where it is registered.

In other words, the *location* of computer resource is *irrelevant* [section 13(4)] and it shall in no way affect the applicability of time & place of dispatch and receipt of electronic records between the originator and the addressee as given in sub-section (3).

6.5.3 Electronic Communication Process and Functional Equivalent Approach

The aforesaid statutory provisions [sections 11-13] as articulated under the Information Technology Act, underlining the process of communication using computer, computer system or computer network are based on UNCITRAL Model Law of E-commerce. This Model Law provides for ‘equal treatment to users of paper-based documentation and electronic information’ which has also been expressed as ‘functional equivalence’, i.e. it is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. The Model Law treats paper-based communication and its equivalent electronic “writing”, which is, in essence, a series of electronic impulses at par. Article 6(1) of the Model Law provides, “where the law requires information to be in writing, that requirement is met by data (electronic) message if the information contained therein is accessible so as to be usable for future reference.”

Moreover, apart from “writing” equivalence, there also exists functional equivalence of a signature, which can be produced cryptographically, referred to as ‘digital (or electronic) signature.’

Table 2: Functional equivalent parameters

Functional Equivalent Parameters	Physical Communications	Online Communications
Writing Requirement	Writing/documents	Electronic records
Signature Requirement	Signature	Digital Signature

Use of Digital Signatures in Online Communications

In order to be called legally binding all online communications must meet the fundamental requirements, *one* authenticity of the sender to enable the recipient to determine who really sent the message, *two* message’s integrity, the recipient must be able to determine whether or not the message received has been modified during the transmission and *third*, non-repudiation, the ability to ensure that the sender cannot falsely deny sending the message, nor falsely deny the contents of the message.

This fundamental requirement of authenticity, message integrity and non-repudiation can also be met using digital signatures with the help of cryptography

technique. Based on the nature and number of keys cryptography has evolved into Symmetric (private key cryptographic system) and Asymmetric (public key cryptographic system) cryptography. In symmetric cryptography a single secret key is used for both encryption and decryption of a message, whereas in asymmetric cryptography encryption and decryption is done involving an asymmetric key pair consisting of a public and a private key.

Basically a digital signature is a two way process, involving two parties: signer (creator of the digital signature) and the recipient (verifier of the digital signature). A digital signature is complete, if and only if, the recipient successfully verifies it.

A signer subscribing to a digital signature can encrypt the entire electronic record using his private key. Once encrypted, the digitally signed document can be transmitted over the Internet. On receipt, the recipient will decrypt the encrypted electronic record using signer’s public key. A successful verification by the recipient would lead to acceptance of the said electronic record by the recipient. This process of creating and verifying a digital signature provide a high level of assurance to the said electronic record and would make it a secured record.

It is imperative to note that by using digital signature a signer is creating a trust in the online environment. It establishes the principle that, in an online environment, the basic legal functions of a signature are performed by way of a method that identifies the originator (sender) of an electronic record and confirms that the originator approved the content of that electronic record; any attempt to change the content of the record must be seen to be incompatible with the signature.

Please answer the following Self Assessment Questions.

Self Assessment Question 3	<i>Spend 4 Min.</i>
(a) A Digital Signature involves two parties and	
(b) When is a Digital Signature complete?	
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Let us now summarize the points covered in this unit.

6.6 SUMMARY

- At a basic level, online contract formation requires online offer/proposal by one party and its online acceptance by the other party.
- For a contract to happen there should be a communication of proposal and communication of acceptance as well.
- This process of communication may involve communication by post or by telephone, while former being referred to as postal communication and latter as instantaneous communication.

- The Information Technology Act identifies three parties to the electronic transmission process: the originator, the intermediary and the addressee. These categories are not to be considered as equivalent to ‘promisor’ and ‘promisee’.
- The said Act not only grants legal recognition to *communication process* involving computer, computer system and computer network by identifying attribution, acknowledgement, dispatch and receipt of electronic records as key statutory provisions, but also provides for a mechanism to create binding trust with the help of digital signatures.

6.7 TERMINAL QUESTIONS

1. Enumerate the role of originator, addressee and an intermediary in an online communication process.
2. What do you understand by the term ‘functional equivalence’? Explain it with the help of examples.
3. What is the importance of digital signatures in an online communication process?

6.8 ANSWERS AND HINTS

Self Assessment Questions

1. Contract has been defined as a two way process. It involves a communication of proposal from first party to the second and secondly a communication of acceptance from the second party to the first.
2. The communication of acceptance is complete
 - as against the proposer when it is put in the course of transmission to him so as to be out of power of the acceptor.
 - as against the acceptor when it comes to the knowledge of the proposer.
3. (a) Signer, Recipient.
(b) A digital signature is complete, if and only if the recipient successfully verifies it.

Terminal Questions

1. Refer to section 6.4 of the unit.
2. Refer to sub-section 6.5.3 of the unit.
3. Refer to sub-section 6.5.3 of the unit.

6.9 REFERENCES AND SUGGESTED READINGS

1. Sharma Vakul. “Information Technology – Law and Practice”. Universal Law Publishing Co. (2004).

2. It was observed by Lord Wilberforce in *Brinkibon Ltd. v. Stahag Stahl und Stahlwarenhandelsgesellschaft mbH*, that since 1955 (when *Entores* ruling came) the use of Telex communications has been greatly expanded, and there are many variations on it. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases, they must be resolved by reference to the intentions of the parties, by sound business practice, and in some cases by a judgment where the risk should lie.....

3. Section 2(c) of the Indian Contract Act, 1872 states: The person making the proposal is called the 'promisor', and the person accepting the proposal is called the 'promise'.

4. An intermediary has function equivalent to that of Post Office or Telephone Exchange.

5. Computer Resource has been defined under section 2 (1) (k) of the Act and includes computer, computer system, computer network, data, computer database or software.